IN THE

Supreme Court of the United States

October Term, 1951.

No. 143.

VERNA LEIB SUTTON,
Plaintiff-Appellant,

vs.

R. WELLS LEIB,
Defendant-Appellee.

REPLY BRIEF OF APPELLANT.

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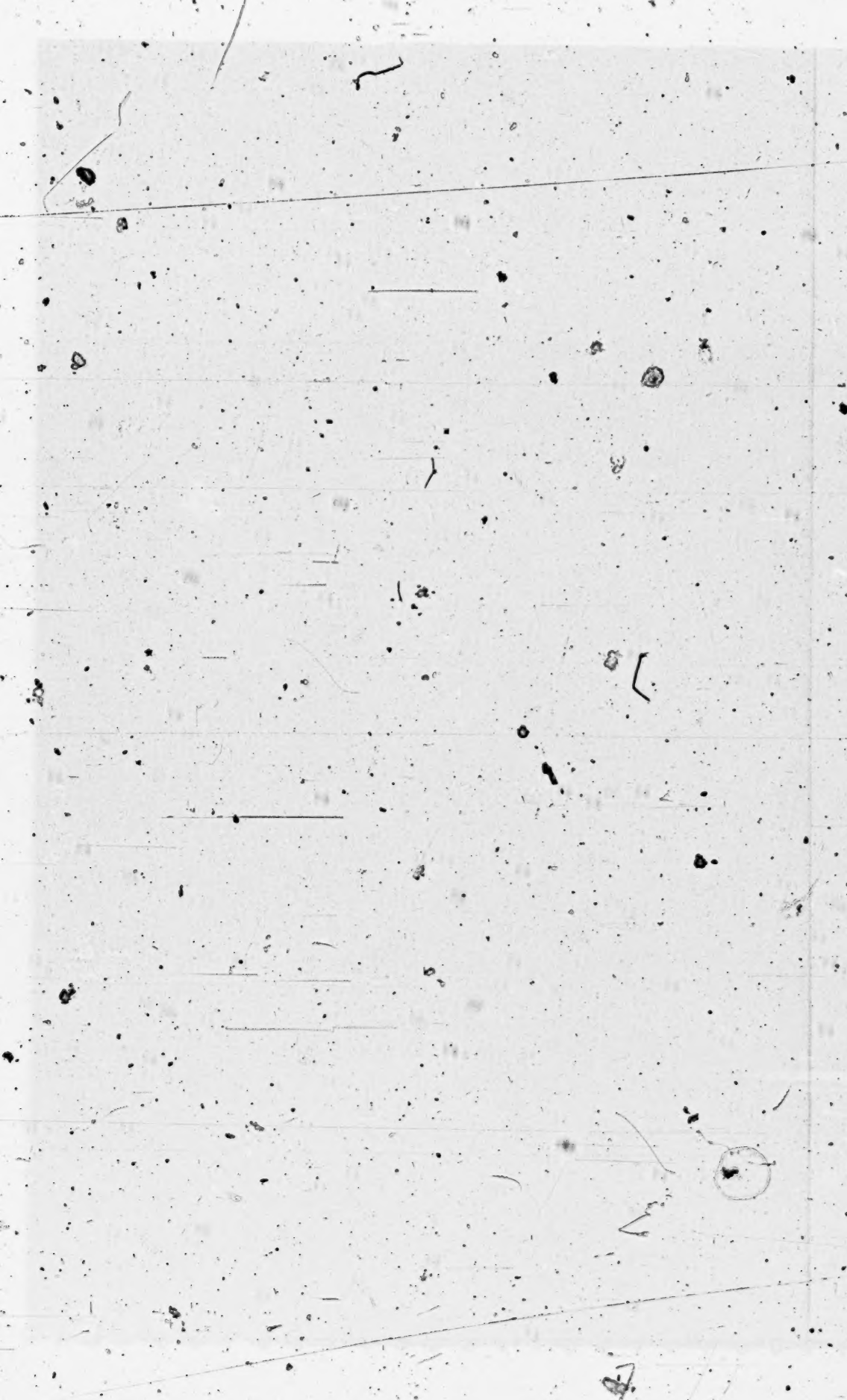

INDEX.

Summary of Rebuttal Argument.

Table of Cases and Textbooks.

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The brevity of appellee makes it possible for this reply brief to be concise. It seems necessary only to examine a few of appellee's statements and supporting authorities. We concur in his correction of the Statement of Facts pertaining to the Court of Appeals' opinion. Alimony had been paid up to "May 1, 1944" and not "July 1". Appellee's payment of $180.00 ($250.00 minus $70.00 credit) took care of the June and July payments.

Before going to any discussion of cases, however, we must challenge appellee's last sentence of the first paragraph of the Argument. It is as follows: "In other words, can the plaintiff-appellant marry, annul, remarry and annul, and collect alimony between her successive marriages following her successive annulment decrees."

Now, let us get the facts straight. There was only one annulment decree at any time—and defendant's liability does not arise from that. The defendant's liability arises

from an alimony decree entered, for his fault, by an Illinois court in 1939 (Tr. 5, 6). If nothing had intervened until plaintiff's remarriage to Sutton in November, 1947, the defendant could not have claimed that he had been relieved from liability at any prior time. Plaintiff, however, entered into a marriage ceremony with Henzel in Nevada in 1944 and defendant claims that this extinguished his liability.

If we are correct in our position, obviously defendant's reasoning is wrong. Defendant takes the position that his liability was extinguished by the Nevada ceremony and revived by the New York annulment. We believe, rather, that the Nevada ceremony was void *ab initio* as bigamous since Henzel already had another wife living, from whom he was not validly divorced. Therefore, the Nevada ceremony was a nullity from its inception and required no decree of annulment to declare it so (Appellant's Brief, 6-8, 17-23). Accordingly defendant's obligation was never extinguished. In view of our previous full discussion of this question, no further discussion seems necessary except to distinguish appellee's cases.

First, however, it seems clear that defendant no longer insists that there was a "release" of the obligation. He admits: "The correspondence discloses beyond question that there was no demand for, or settlement of, alimoney (sic—alimony) to become due *in futuro*. * * * In his findings the trial court inadvertently used the word 'release.' * * * . * * * release was not pleaded as a defense by the defendant. The entire controversy in the trial court turned upon the single question of whether the plaintiff, Verna Leib, had entered into a valid marriage contract in Nevada with Walter Henzel" (Appellee's Brief, 7, 8. See also p. 4 under "The Contested Issues").

Accordingly, we may accept this as an admission by appellee that the trial court's *reason* for its decision was

erroneous in this regard; that appellee does not here contend that there was a valid release; and that the sole issues are the validity of the remarriage in Nevada and its effect so far as the Illinois alimony decree is concerned. If there was a valid remarriage within the contemplation of the Illinois decree, the defendant is discharged. If there was not a valid remarriage for this purpose, the defendant remains liable. This greatly narrows down and simplifies the controversy.

To sustain his contention that the remarriage in Nevada was legally valid, defendant relies largely upon the Restatement of Conflict of Laws, certain language from the two *Williams* cases, and three Illinois cases—namely *Peirce* v. *Peirce*, 379 Ill. 185; *Criss* v. *Industrial Commission*, 348 Ill. 75; *Stevens* v. *Stevens*, 304 Ill. 297. These are the only cases discussed in his Argument. Let us look briefly at these authorities.

Looking first to the Restatement, appellee quotes from Section 121 and says: "Except as stated in 131 and 132 (polygamy, incestuous, etc.) a marriage is valid * * *." The first word in parentheses answers appellee's contention. When Henzel had a wife living from whom he was not validly divorced, his marriage to plaintiff was polygamous—since bigamy is, in legal effect, polygamy.

Turning to Section 132 of the Restatement, we find that it expressly states that: "A marriage which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:

(a) polygamous marriage."

That is the situation which we have here. Since Henzel is not permitted to have two wives simultaneously, the law refuses to recognize as valid his attempted marriage to plaintiff upon July 3, 1944. This situation is to be

distinguished from that set up in Sections 130 and 131 where a party such as Henzel may have been validly divorced but forbidden to remarry within a certain period fixed by law. And eminent counsel for the appellee have consistently, and do even now, fail to distinguish between these two situations.

In *Peirce* v. *Peirce*, 379 Ill. 185 (cited as *Pierce* v. *Pierce*), no bigamous relationship was involved. Harry Peirce left his wife in Illinois and went to Mexico where he married another woman. They then moved to Nevada. His Illinois wife procured a divorce. Nevada at that time recognized common law marriages. Later Peirce died and the present proceedings dealt with legitimacy of the children of the common law marriage. The court expressly stated (p. 190) that there was no question that the Mexican marriage was wholly void. However, the living together of Peirce and his second wife as domiciliaries of Nevada *after the Illinois wife divorced Peirce,* established a valid common law marriage in Nevada. Even then, our court added (pp. 190, 191):

> "We are not called upon to recognize the common law or however designated marriage of Era Peirce and deceased in Nevada as valid, contrary to the public policy of this State. We do, however, recognize the effect of the attainment of marital status under the laws of Nevada insofar as it operates to make the children legitimate."

This scarcely supports appellee's position. The case next argued is *Criss* v. *Industrial Commission,* 348 Ill. 75. This was a case falling squarely under Section 131 of the Restatement. Eva Criss divorced her first husband in Alabama on November 5, 1919, and remarried upon November 27, 1919, in Illinois where she and her second husband thereafter resided. The Alabama decree, pursuant to an Alabama statute, had restricted her from remarry-

ing for a period of 60 days. The Illinois court held that the remarriage would be recognized as valid since the prohibition against remarriage within 60 days would be given no extraterritorial effect. Again there was no polygamous marriage involved.

The third Illinois case argued by appellee is *Stevens* v. *Stevens*, 304 Ill. 297. Eliza Hill Hayes had been living in Illinois for about four years when her husband, whom she had deserted in Arkansas, procured a divorce from her upon March 7, 1912. Illinois at that time had a provision prohibiting remarriage of divorced persons within one year after divorce. In July, 1912, Eliza and William Stevens tried to obtain a marriage license in Illinois which was refused because of the above statute. They went to Indiana, were married, and immediately returned to Illinois. Upon Stevens' death, Illinois held the Indiana marriage, performed between Illinois domiciliaries in violation of Illinois laws, to be invalid. Rather than supporting appellee's contentions, the court declared (p. 302): "the marriage celebrated in Indiana had no other purpose than evading the statute of this state and the marriage was void."

Thus, the result in the *Stevens* case is contrary to that stated by appellee, even though it involves only Section 131 and not Section 132 of the Restatement. In fact, looking at appellee's quotation from that case (Appellee's Brief, 14), we find that what purports to be the end of the sentence is actually not the terminal point. Appellee has omitted the following significant words (p. 300 of opinion): "* * * with certain exceptions, such as marriages which are incestuous according to the generally recognized belief of Christian nations, *polygamous*, or which are declared by positive law to have no validity in the state of the domicile." (Italics supplied.) Surely the omission was inadvertent but the added words show that Illinois accords with the general rule.

Since appellee has not deemed the mass of citations contained under his Propositions of Law to be worthy of discussion in his Argument, we will not discuss those cases at length. Since he now admits there was no release of future alimony, and we admit he was paid up through July 3, 1944, we will not discuss cases cited under I (Appellee's Brief, 3), but only those under II (Appellee's Brief, 4, 5).

Ertel v. *Ertel*, 313 Ill. App. 326, involved merely the question of whether a person had sufficient mentality to enter into a valid marriage in Missouri, the court properly holding that its validity depended upon Missouri law. *Reifschneider* v. *Reifschneider*, 241 Ill. 92, was concerned with the validity of a marriage between persons of less than adult years in Indiana, and Indiana law controlled. *In re Youman's Estate*, 15 N. W. 2d 537, involved the validity of an adoption only. *Travers* v. *Reinhardt*, 205 U. S. 423, dealt with the validity of a common law marriage, similar to *Peirce* v. *Peirce* previously discussed.

Lehmann v. *Lehmann*, 225 Ill. 513, again involved the validity of a remarriage in violation of a one year restrictive provision. The same is true of *Powell* v. *Powell*, 207 Ill. App. 292, and *Loughran* v. *Loughran*, 292 U. S. 216. *Lembcke* v. *United States*, 181 Fed. (2d) 703, also involved a restrictive provision of a decree which was held not to change the status of a Pennsylvania "widow" under a governmental life insurance contract. *Alaska Packers Association* v. *Industrial Commission*, 294 U. S. 532, approved a statute allowing compensation for injuries received beyond state borders. *New York ex rel Halvey* v. *Halvey*, 330 U. S. 610, expressly refrained from passing on the jurisdiction of a Florida court to enter certain judgment decrees, and permitted New York to modify a custody decree entered by Florida.

It will be seen that none of these cases deal with the situation where one man completes his matrimonial in-

volvements with two wives. In none of the appellee's authorities was a polygamous situation discussed. But, in the instant case, Henzel returned to his domicile, New York, still married to his first wife, and, ostensibly, with a new wife as well. Since all states refuse to recognize bigamous marriages, the second marriage was *ipso facto* void and required no decree of court to declare it so. Had the first wife been served with process in Nevada, or entered her appearance in those proceedings, a different result perhaps would have followed—simply because the divorce would then have been valid and Henzel would have been free to remarry. But Nevada obtained no jurisdiction over Dorothy Henzel; it had no jurisdiction to enter its divorce decree; Henzel was not divorced—and the New York residents, namely Walter Henzel, Dorothy Henzel and Verna Leib (the plaintiff) found their legal relationships unaltered by the various steps taken in Nevada prior to July 4, 1944.

We are not going to attempt to discuss the holdings in the *Williams* cases or other more recent decisions of this court. This court is far more familiar than are we with the facts in those cases, the basic reasons for the decisions, and the meaning of the language employed. If we are correct in our original analysis (Appellant's Brief, pp. 8, 9, 24-27), the acts in Nevada were entitled to full faith and credit only if, in the divorce proceedings, Dorothy Henzel had been personally served in Nevada, or had entered her appearance in that State. Since Nevada acquired no jurisdiction over her, the domicile, New York, which had jurisdiction over both Dorothy and Walter Henzel, was left free to inquire into all issues—including that of jurisdiction of the Nevada court. The New York decrees, where the court had jurisdiction of the parties and subject matter, were themselves entitled to full faith and credit everywhere. Furthermore, the remarriage in Nevada was not one relieving the defendant of his obligations

under the alimony decree as construed by previous Illinois decisions (Appellant's Brief, pp. 6-8, 14-22), for reasons of Illinois public policy dealing with the necessity of support for divorced women.

A final word and we are done. Defendant sheds tears (crocodile, we fear) over his situation as an innocent party having had no opportunity to intervene in New York or Nevada. If the whole world is bound by the New York decree, surely the defendant should not complain as a mere member of the universe. After all, how has he been prejudiced? He was divorced for his fault. The Illinois decree fixed alimony. He has not paid $5,000.00 of the alimony so fixed. Whether he paid it as required by the terms of the decree, or pays it now, he is in no worse position. His losses, if there are any, arise from his struggles to keep from paying the accrued indebtedness.

And, if the defendant or his counsel have guessed wrong upon his legal liability, should they criticize the plaintiff because, in 1944, she was unaware of her true legal situation, or was improperly advised thereon? After all, the provision for remarriage as relieving defendant of his obligations was inserted in the Illinois decree because a woman is normally not entitled to support from two men simultaneously. But when the attempted remarriage is a nullity, a second obligation of support never arises; and the defendant was not released.

This seems elementary and reasonable.

Respectfully submitted,

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